NO. 46964-2-II

COURT OF APPEALS, DIVISION TWO
OF THE STATE OF WASHINGTON

NEAL and MARILYN McINTOSH, husband and wife, et al.,

Respondents,

v.

AZALEA GARDENS, LLC,

Appellant.

BRIEF OF RESPONDENTS

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I. INTRODUCTION

This appeal is about how a reasonable person would construe the ambiguous term "capital improvements"–otherwise undefined–within an "additional rent" clause in a long-term mobile home park lease.

The plaintiffs (the "Tenants") were led to believe by pre-sale fliers that the park would provide maintenance for the roads, clubhouse and common areas. When the park owner ("Azalea") tried to charge the Tenants $20,415.29 for maintenance to the roads, the Tenants filed the present lawsuit, contending that it was improper for Azalea to charge the maintenance expenditure back to the Tenants for two reasons: first, because the road maintenance was not a capital improvement, no additional rent could be charged; and second, even if the maintenance were a capital improvement, the lease provided only a rate of return of twelve percent as additional rent, not the entire expenditure.

Following a one-day bench trial, the trial court agreed, finding that (a) the $20,415.29 was expended for maintenance, (b) even if the expenditure was for a capital improvement, Azalea could charge only a "rate of return" on the expenditure, and not the entire expenditure, (c) the term "capital expenditure" was ambiguous and should be

construed against Azalea as the drafter and in favor of the Tenants, and (d) considering the reasonable expectations of the parties based on the disclosures of maintenance at the onset of the lease, the term "capital expenditure" applied only to new construction or new facilities with the exception of governmentally-mandated capital improvements.

Azalea's appeal concedes the correctness of the trial court's rulings, except the alternative basis for the trial court's ruling that capital improvements had to be new construction (with the exception of governmentally mandated capital improvements). Azalea also challenges the trial court's attorney fee award in favor of the Tenants. The Tenants contend that substantial evidence supports the trial court's findings and that the trial court's reduction of the Tenants' counsel's fee request from $49,743.75 to $37,432.50 was properly evaluated by the trial court and was within the range of the trial court's discretion.

II. COUNTER STATEMENT OF THE CASE

Respondents (the "Tenants") are tenants in defendant park owner's (Azalea's) mobile home park in Graham, Washington. The Tenants own their own manufactured homes and lease the lots upon which the homes sit (CP 342-43; FOF #1).

When plaintiff Neal McIntosh moved into Azalea Gardens Mobile Home Park ("Azalea") in 2003 or 2004, half of the lots were unoccupied (RP 10/21/14 at 9-10). Azalea was trying to attract new tenants to purchase manufactured homes in the high-end park and rent the lots on which the homes were located through the lure of (a) long-term leases–twenty to twenty-five years in length–, (b) a guarantee that rents would be keyed to the Consumer Price Index (CPI), for the protection of the home buyers, and (c) maintenance would be provided by the developer (park) (FOF #2, #3, #6).

Sales fliers were available and distributed to potential purchasers of homes. These fliers announced the numerous benefits of long-term lot leases: "The developer, not the homeowner, pays for [m]aintenance of entry, clubhouse and common areas . . . [and] [m]aintenance of streets, sidewalks, electronic gates and community lighting" (Tr. Ex. 2). The leases all contained identical clauses providing that tenants would pay as "additional rent" over and above the normal monthly rent amount "a twelve percent (12%) rate of return for funds expended [by Azalea] on capital improvements . . ." (FOF #7).

Years later, after tenants had purchased homes in the park and moved in, Azalea decided to hire contractors to seal coat the roads in

the park, i.e., apply a thin emulsion coating on the surface of the asphalt so as to protect asphalt from degradation, much like the painting of a house to protect the exterior wood surface (FOF #8, #9).

Many mobile home parks provide tenants with one-year leases.[1] This is the default lease term.[2] There is no rent limitation under Washington law, and a mobile home park landlord may increase rent upon the expiration of the rental term by notifying the tenant in writing three months prior to the effective date of any rental increase.[3]

Most mobile home parks at the time Azalea was being developed used month-to-month or one-year leases, so the park owner believed people moving in the park would like 20-year leases, and the use of such leases would be advantageous for the park (RP 10/21/14 at 42).

The written lease in this case–identical for all Tenants--generally provides for an initial twenty-year term with annual rent increases tied to increases in the Consumer Price Index (Tr. Ex. 1, Lease, ¶ 2). Thus the lease protects the initial tenants from unknown

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[1]A mobile home park landlord is required to offer a prospective tenant a written rental agreement for a term of one year or more, before renting a space to the tenant. RCW 59.20.050(1).

[2]RCW 59.20.090(1) provides that "[u]nless otherwise agreed rental agreements shall be for the term of one year."

[3]RCW 59.20.090(2).

or potentially excessive rent increases during the period of the leases.[4] In addition to annual increases based on the CPI, the lease provides for additional separate charges for various items not involved in this litigation (FOF #5).[5]

The park and the tenants also agreed in their leases that the park owner would be compensated for amounts it spent on "capital improvements" in the following language:

> As additional rent, the Owner shall be compensated by Resident (1/97th per space) on the basis of computation of a twelve percent (12%) rate of return for funds expended on capital improvements either mandated by a governmental entity or deemed necessary by Owner. The charge to the Residents shall be allocated equally to each homesite. The twelve percent (12%) rate of return to the

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[4]If the tenant assigns his lease, i.e., sells his home, before the twenty-year term expires, the lease "shall automatically convert to a one (1) year lease beginning on the effective date of the assignment" (Lease, ¶ 17; CP 67). The rent for the new owner is then subject to increase on January 1 of each year, and there is no expressed limitation on how much rent the park may thereafter charge. *Id.* The Washington Supreme Court has held such a conversion-upon-sale clause to be enforceable. *Little Mountain Estates Tenants Ass'n v. Little Mountain Estates MHC, LLC*, 169 Wn.2d 265, 267, 236 P.3d 193 (2010).

[5]For example, the rent may adjusted for increases in real estate taxes. The tenants are also required to pay extra vehicle and extra recreational vehicle storage charges, if they store such vehicles (Lease, ¶ 2). Tenants also agreed to pay a $21 "monthly sewer charge" (Lease, ¶ 3) and pay for all utilities supplied to their lots (Lease, ¶ 4). Tenants are responsible for their "individual sewer step system, which is an integral part of their home; this includes periodic preventive maintenance, repair of sewer step system pump and sewer step lines, and periodic pumping of holding tank located on said manufactured home lot" (*Id.*).

> Owner shall be for a period not to exceed the period of depreciation of such improvement.

(Lease, ¶ 2; CP 324; FOF #7). There are 97 lots in the park, so the tenant(s) at each lot would pay his or her pro rata share (1/97th) of the cost of the 12% rate of return on expenditures for capital improvements (FOF #26). The apparent rationale for the tenants' paying "additional rent" for funds expended on "capital improvements" is that (1) the tenants would benefit from new facilities, e.g., swimming pool, nature trail, new roads, enlargement of the clubhouse, etc., and (2) the landlord would receive a gain or profit, i.e., not only the value of the asset itself (and presumably the increased value of the park), but also the 12% profit on the monies it expended on capital improvements (CP 457; COL #12).

While the lease does not specifically mention who pays the expense of maintaining the roads in the park, or for that matter, the expense of any other park maintenance (FOF #5), the sales fliers did. And the MHLTA requires the park to "[m]aintain the common premises." RCW 59.20.130(1). Roads and the clubhouse, for example, are common premises, as they are used by all the tenants in common. The park owner also has the specific duty to "[m]aintain roads within the mobile home park in good condition[.]" RCW 59.20.130(9).

The sales fliers used to attract tenants to the park stated that

the homeowner did not have to pay for "[m]aintenance of streets[,]" the clubhouse or common areas, and pointed out that such a provision was a benefit of long-term lot leases (CP 453; FOF #6; Tr. Ex. 2). The park apparently set the initial rent level at an amount that would permit the park to pay for on-going maintenance out of tenants' monthly rent payments and at the same time provide a reasonable return on the park's investment. There is no evidence that the park ever charged below-market rent. Seal coating is a process by which an emulsion is applied to the road surface to seal it so that water does not penetrate over time, causing cracks and breakdown of the asphalt (FOF #9). Applying seal coating to the park roads is a routine task that has to be performed "regularly," and it is even referred to as "seal coating maintenance" (FOF #10; Tr. Ex. 6). It is recommended to be applied "approximately every 3 to 5 years" (Tr. Ex. 6). A person who does this work is referred to as a "professional pavement maintenance contractor." *Id.* at 2. It is referred to as part of "routine maintenance." *Id.* at 3.

Significantly, when the park seal coated part of the park road in 2006, it did not label that work as a "capital improvement," or charge the tenants for it, as the park did not consider it fair to do so (RP 10/21/14 at 46; FOF #30).

In July, 2011, the park notified residents that a "crack-filling, sealcoating, and re-striping project" would take place in the park, and that the cost for the project was $20,415.29 . The park labeled this project a "capital improvement" and required the tenants to pay their allocated share of the cost. That allocated share was $210.47 per space.

The tenants disputed that the project was anything other than routine maintenance (FOF #19). They argued that the project was not a "capital improvement" as that term was used in the lease, and therefore the tenants could not be required to pay it (CP 454; FOF #29). When the tenants' complaints to the Attorney General's office were unable to resolve the dispute, the tenants filed the instant lawsuit seeking a refund of the monies paid for the project.[6] The Tenants asserted theories of breach of the lease and violation of the Washington Consumer Protection Act (CP 59-61). Azalea filed counterclaims for declaratory relief (CP 92-94). The relief sought was a general declaration "as to the rights and obligations between the Plaintiffs and Defendant arising under any rental agreement between

[6]The AG's office took no position on the issues raised in this lawsuit, acknowledging that different conclusions could be reached regarding the legal ramifications from the existing facts (CP 84-86). While this letter was attached as part of Azalea's materials in support of its summary judgment motion, the letter was not admitted as an exhibit at trial.

the Plaintiffs and Defendant . . ." (CP 92-93, ¶ 6.2) and a declaration that Azalea's "leases and prior actions or omissions comply with the Plaintiffs' leases . . ." (CP 93, ¶ 6.3). The words "capital improvements" were not specifically mentioned in the counterclaims, and no reference was made to the portion of paragraph 2 above regarding additional rent.

Both parties moved for summary judgment. Azalea moved for summary judgment on the Tenants' breach of lease and CPA claims (CP 30-43). The Tenants moved for partial summary judgment on their breach-of-lease claim (CP 131). The trial court granted Azalea's motion as to the Tenants' CPA claim and dismissed that claim (CP 206), but denied the parties' other claims regarding summary judgment (CP 207).

At trial, Azalea sidestepped the lease language concerning Azalea's "rate of return" on funds expended for capital improvements and argued that the additional-rent clause quoted above provides that "*any funds* Azalea expends on capital improvements shall be reimbursed by the tenants as temporary Additional Rent" [italics added] (CP 304, 320).[7] The twelve percent "rate of return" language

[7]Azalea also argued that "the parties intended that Additional Rent be temporary, fair, and transparent, rather than allowing the Landlord to arbitrarily and permanently increase rent to cover undisclosed costs" (CP 305). Azalea further asserted that "the original parties [to the lease

was interpreted by Azalea to apply only to the outstanding balance of those tenants who chose to pay their $210.47 share in installments (CP 306). Azalea asserted that the "only reasonable interpretation of the term 'capital improvement' is that the project triggered 'Additional Rent' because that work improved the roadway surface for a smoother ride, extended its useful life, and delayed the higher expense to each tenant it would require to reinstall the roadways" (CP 311).

Azalea also argued in its trial brief, motions in limine and other filings throughout the case that tax laws and the tax code interpretation of the term "capital improvement" were not applicable to the lease in question and that the "public policy of tax law is not relevant to this Court's interpretation of the parties' lease" (CP 153-54, 268, 311-12). Azalea even stated that "[t]ax law is entirely different from contract law[,]" and "tax laws cannot change the outcome of this lease dispute" (CP 33, fn 3).

At trial, the Tenants introduced evidence of a sales flyer given to Tenants before they purchased homes stating that the monthly fee payable by the Tenants "pays for" the "[m]aintenance of streets[,]" the clubhouse and common areas of the park (Tr. Ex. 2). In a sheet entitled "Frequently Asked Questions" given to the Tenants around the

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agreement] intended that 'Additional Rent' allow for temporary increases [in rent] arising out of extraordinary expenses" (CP 308).

time the seal coating work was done, Azalea answered the question of what was the "definition [sic] between capital improvements and maintenance" as follows:

> Good question! You are likely to find many different answers when trying to define the difference between capital improvements and maintenance depending on who you ask. In the business of real estate investments and property management, the determination of expenses as being either "maintenance" or a "capital improvement" is generally determined by the Internal Revenue Service's guidelines. CPA's filing tax returns for real estate investments, such as Azalea Gardens, have codes provided by the IRS that instruct the CPA on classifying expenses as either a maintenance expense that is deducted in the year it was incurred, or as a capital improvement that is depreciated over time. Generally speaking, taxpayers are required to capitalize expenses that substantially prolong life [sic] of the property.

(Tr. Ex. 5).

To establish that Azalea did not independently characterize the road project as a "capital improvement," Azalea's accountant, Mark Middlesworth, was called as a witness by the Tenants (RP 10/21/14 at 68). He testified that he classified the project expense as a capital improvement (*Id.*; FOF #22). Contrary to his deposition testimony, he denied at trial that he accounted for it in that manner on account of being told by Christy Mays (the park's regional manager), that an overlay of asphalt was put down on the road surface, as opposed to just sealing the road (*Id.* at 68-69). He was impeached with his

contradictory deposition testimony (*Id.* at 69-70), as there was no evidence at trial that any such asphalt was put down, except for minor crack filling in the pavement. Seal coating, in his opinion expressed at his deposition and introduced at trial, would be a repair because "it usually doesn't substantially improve the economic useful life of an asset" (RP 10/21/14 at 71-72; FOF #23). The basis for Azalea's tax accounting treatment was incorrect, as the seal coating involved in this case did not include any significant laying of asphalt (FOF #24).

The Tenants did not argue at trial that IRS regulations were dispositive of the interpretation of the term "capital improvements" in the leases, or that the park roads were necessarily capital improvements.

Azalea called only one witness at trial, Steve Harer, the managing member of Azalea Gardens, LLC. (RP 10/21/14 at 41). He testified that there were thirteen mobile homes in the park when he purchased the park at the beginning of 2001 (*Id.*). He further stated that he did not talk to any of the plaintiffs about the meaning of the term "capital improvements" in the lease (RP 10/21/14 at 48).

The trial court adopted the Tenants' construction of the ambiguous lease provision at issue, issuing findings of fact and conclusions of law on October 31, 2014 (CP 377-385). Azalea filed a

motion for reconsideration (CP 386-403), and the trial court modified slightly its conclusions of law (CP 451-59).

The trial court concluded following reconsideration that Azalea's interpretation of the lease was contrary to the language expressed in the lease, as the lease "does not provide for 12% interest. It requires a 12% rate of return for funds expended on capital improvements" (CP 456, COL #5). The trial court found that seal coating was a part of normal and routine maintenance of asphalt roads (CP 457, FOF #12). Azalea does not contest this finding or the trial court's conclusion (App. Br. 3, fn 1; App. Br. 6, fn 6; App. Br. 9).

The trial court did not adopt wholesale the IRS definition of a "capital improvement," but adopted a more nuanced approach to determine that a "capital improvement" as that term was used in the leases "refers not to repairs or maintenance, but in the sense *or similar to* usage in IRS regulations, i.e., to improvements of a capital nature, such as new buildings, facilities, permanent improvements, or betterments made to increase the value of property" (italics added) (CP 457, COL 9).[8] The Tenants had argued in this litigation for such

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[8]The trial court also noted that the distinction between repairs or maintenance and a "capital improvement" was "frequently expressed in terms of whether the expenditure in question 'keeps' or 'puts' the asset into its ordinary operating condition. If the expenditure 'keeps' the asset in its ordinary operating condition, the expenditure is considered an expense for

an interpretation (CP 169, 181, 235, 286, 449-450).

The trial court further specifically concluded that paragraph 2 of the lease was ambiguous, and that such ambiguity should be construed against Azalea as the drafter of the lease, and considering the context in which the lease was negotiated and signed, and evidently as an additional basis for its decision, "the Court concludes that a 'capital improvement' as used in the leases refers to a new capital improvement, and not the replacement or repair of an existing capital improvement" (CP 458, COL #14).

As determined by the trial court, the "apparent rationale for the tenants' paying 'additional rent' for funds the Landlord expended on 'capital improvements' is that (1) the tenants would benefit from new facilities, e.g., swimming pool, nature trail, new roads, enlargement of the clubhouse, etc., and (2) the landlord would receive a gain or profit, i.e., not only the value of the asset itself (and presumably the increased value of the park), but also the 12% profit on the monies it expended on capital improvements" (CP 457, COL #12).

In its reply to the Tenants' response to Azalea's motion for reconsideration, Azalea argued that a government agency might

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maintenance and repair. If the expenditure 'puts' the asset into its ordinary operating condition, then the expense is of a capital nature" (CP 457, COL 10).

mandate a safety requirement that sprinklers be installed in the clubhouse, or that if a tree destroyed the roof to the clubhouse, a government agency might mandate the construction of a new roof before the clubhouse could be occupied (CP 444). Responding to Azalea's argument, the trial court modified Conclusion of Law #13 by striking what had previously been entered and inserting the handwritten sentence: "A capital improvement mandated by a government agency, however, need not relate to a new capital improvement" (CP 458, COL #13).[9]

The trial court awarded attorney's fees to the Tenants as the prevailing parties in the litigation (CP 547-552). The trial court also dismissed Azalea's counterclaims (including the counterclaim for declaratory relief) with prejudice (CP 519, 547).

The Tenants' counsel requested attorney's fees in the lodestar amount of $39,795.00, based on 113.3 hours of work at Tenants' counsel's normal billing rate of $350 per hour (CP 406). In addition, Tenants' counsel requested an upward multiplier of 1.25 to account for the contingent nature of the case and its general undesirability, resulting in a total fee request of $49,743.75 (CP 408).

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[9]Paragraph 2 of the leases referred to "funds expended on capital improvements either mandated by a governmental entity or deemed necessary by Owner" (CP 63).

The trial court denied a multiplier, despite the contingent nature of the case, because the trial court believed that this was "a relatively straightforward case" (RP 11/26/14 at 13). In response to Azalea's objection that Tenants' counsel did not itemize the time spent on the unsuccessful CPA claim, Tenants' counsel asserted that he had segregated the fees relating to the CPA claim and removed them (*Id.* at 14-15), which time was about ten hours (*Id.* at 16). The trial court concluded that Tenants' counsel's hours were reasonable (*Id.* at 17). Azalea also objected to the amount of time Tenants' counsel spent on tax-law research, but the trial court considered that a big issue in the trial and allowed such time (*Id.*).

Azalea also argued that Tenants's counsel's rate of $350 per hour was not a reasonable hourly rate for Pierce County, where the case was tried, since the Rules of Professional Conduct refer to a reasonable hourly rate's being determined by the locality from which the action was brought, but the trial court rejected that argument and allowed $350 per hour as Tenants' counsel's normal hourly rate (RP 11/26/14 at 18-19).

The trial court also considered Azalea's objection to Tenants' counsel's charging for driving time from Seattle to Tacoma or to Graham as part of the lodestar calculation (RP 11/26/14 at 19).

Ultimately the court discounted Tenants' counsel's driving time by one half to $175 per hour for driving time rather than $350 per hour (*Id.* at 20). The trial court therefore eliminated the requested 1.25 multiplier of about $10,000 and reduced the lodestar fee from $39,795.00 to $37,432.50 (CP 498) by lowering Tenants' counsel's hours from to 113.3 to 106.95 (*Id.*). The total attorney's fees awarded were $37,437.50, instead of the $49,743.75 requested (CP 498).

Azalea complains on appeal that the trial court's conclusion that the term "capital improvements" applies only to new construction is not supported by the evidence or any arguments by the parties at trial, and that such interpretation of the lease would prejudice Azalea when it attempted to bill tenants for future additional work on existing facilities, such as roads, fences or the clubhouse (App. Br. 15-16).

Azalea also complains on appeal that the trial court essentially rubber stamped the Tenants' counsel's attorney fee request without reviewing it for reasonableness (App. Br. 17).

As demonstrated below, Azalea's arguments are without merit.

III. SUMMARY OF ARGUMENT

Substantial evidence supports the trial court's conclusions that (1) the ambiguous language regarding "capital improvements" in the additional-rent clause of the lease refers not to repairs or

maintenance, but in the sense or similar to IRS usage, i.e., to improvements of a capital nature, such as new buildings, facilities, permanent improvements, or betterments made to increase the value of property (CP 457, COL 9) and (2) the ambiguous language in paragraph 2 of the lease applies to a new capital improvement, and not to the replacement or repair of an existing capital improvement (CP 458, COL 14).

First, the sales fliers passed out to prospective tenants stated that the park would maintain the roads, clubhouse and common areas and basically maintain the park, thus giving rise to a reasonable belief, based on the common meaning of the term "maintenance," that the additional-rent clause would apply only to non-maintenance items, i.e., new buildings or facilities (Tr. Ex. 2).

Second, IRS regulations give useful guidelines regarding the meaning of the term "capital improvements," but such regulations are not controlling or dispositive in connection with an interpretation of the ambiguities in the additional-rent clause, because (1) tenants cannot be expected to know the intricacies of tax law, and (2) if IRS regulations were dispositive, the interpretation of a capital improvement would shift every time there was a new treasury ruling, change in tax regulations, or new judicial decision on the subject, thus

causing instability and inconsistency in interpreting the lease.

Third, the park's manager advised the Tenants that what was a capital improvement was subject to varying interpretations, and such term was generally construed in accordance with IRS guidelines (Tr. Ex. 5).

Fourth, the trial court's interpretation is consistent with existing case law on the subject, e.g., *Ocean Club Condominium Association, Inc. v. Gardner*, 318 N.J.Super. 237, 239, 723 A.2d 623, 624 (1998), which interpreted the term in the condominium context as the "creation of some new common facility or installation; that is, something beyond the items which were part of the original construction. An example would be the installation of a tennis court where none existed previously. In contrast, replacement and repair relates to common elements already in existence."

Fifth, because of its many different meanings, the term "capital improvements" is ambiguous, and should therefore be construed against Azalea, the drafter and lessor. Such construction calls for a narrower interpretation that what IRS guidelines permit, to de-incentivize the intentional creation and taking advantage of ambiguity.

Sixth, the "rationale for the tenants' paying 'additional rent' for funds the Landlord expended on 'capital improvements' is that (1) the

tenants would benefit from new facilities, e.g., swimming pool, nature trail, new roads, enlargement of the clubhouse, etc., and (2) the landlord would receive a gain or profit, i.e., not only the value of the asset itself (and presumably the increased value of the park), but also the 12% profit on the monies it expended on capital improvements" (CP 457, COL #12). This is win-win for both the park owner and the tenants.

Finally, Azalea presented no competing cohesive, reasoned and compelling interpretation of the term "capital improvements" in the trial court, nor does Azalea provide this court with a cohesive, reasoned and compelling interpretation different from the trial court's interpretation.

The record shows that the trial court carefully scrutinized Tenants' counsel's fee request, considered Azalea's objections and conducted a lengthy hearing on the issue of attorney's fees on November 26, 2014. Azalea has failed to establish an abuse of discretion in the trial court's award of attorney's fees.

Since Azalea obtained no affirmative relief in the trial court, it did not prevail there. Its counterclaim for declaratory relief was dismissed with prejudice (CP 519). The Tenants' attorney fee award should not be diminished on the basis of some imagined, theoretical

or moot victory that Azalea might put forward so as to claim that it prevailed on a major issue, thus depriving the Tenants of the fruits of their success in the court below.

IV. LEGAL ARGUMENT

A. This Court Reviews the Trial Court's Findings of Fact for Substantial Evidence and Conclusions of Law for Support in the Findings of Fact.

In reviewing a trial court's decision after a bench trial, the court of appeals determines whether substantial evidence supports the findings of fact and, if so, whether the findings support the conclusions of law and the judgment. *SAC Downtown Limited Partnership v. Kahn*, 123 Wn.2d 197, 202, 867 P.2d 605 (1994). If substantial evidence exists, an appellate court will not substitute its judgment for the trial court's. *Croton Chem. Corp. v. Birkenwald, Inc.*, 50 Wn.2d 684, 685, 314 P.2d 622 (1957). The party claiming error has the burden of showing that a finding of fact is not supported by substantial evidence. *Fisher Props. Inc. v. Arden-Mayfair Inc.*, 115 Wn.2d 364, 369, 798 P.2d 799 (1990).[10] Substantial evidence is a

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[10]Where the trial court erroneously labels a finding of fact as a conclusion of law, the court of appeals reviews it as a finding of fact. *Scott's Excavating Vancouver, LLC v. Winlock Props., LLC*, 176 Wn. App. 335, 342, 308 P.3d 791 (2013), *review denied*, 179 Wn.2d 1011 (2014). Where the trial court erroneously labels a conclusion of law as a finding of fact, the appellate court reviews it as a conclusion of law. *Id.*

"quantum of evidence sufficient to persuade a rational fair-minded person that the premise is true." *Sunnyside Valley Irrigation Dist. v. Dickie*, 149 Wn.2d 873, 879, 73 P.3d 369 (2003). Azalea has not met that burden here.

The appellate court views all evidence and inferences in the light most favorable to the prevailing party. *Lewis v. Dep't of Licensing*, 157 Wn.2d 446, 468, 139 P.3d 1078 (2006). The appellate court defers to the trial court's determinations on issues of conflicting evidence, witness credibility, and persuasiveness of the evidence. *Scott's Excavating Vancouver, LLC*, 176 Wn. App. at 342 (citing *City of Univ. Place v. McGuire*, 144 Wn.2d 640, 652, 30 P.3d 453 (2001)). When the trial court's findings are susceptible of two constructions, one that supports the conclusions of law and one that does not, the appellate court construes the findings in the manner that supports the trial court's conclusions of law. *Lincoln Shiloh Assoc, Ltd. v. Mukilteo Water Dist*, 45 Wn. App. 123, 131, 724 P.2d 1083 (1986).

The goal of construing a contract is to determine and to effectuate the parties' mutual intent. *Hall v. Custom Craft Fixtures, Inc.*, 87 Wn. App. 1, 7, 937 P.2d 1143 (1997). Interpreting the meaning of a contract provision is primarily a question of fact. *Martinez v. Miller Indus., Inc.*, 94 Wn. App. 935, 943, 974 P.2d 1261 (1999) (citing

Denny's Restaurants, Inc. v. Security Union Title Ins. Co., 71 Wn. App. 194, 201, 859 P.2d 619 (1993)). Contract interpretation involves "a question of law only when (1) the interpretation does not depend on the use of extrinsic evidence, or (2) only one reasonable inference can be drawn from the extrinsic evidence." *Martinez*, 94 Wn. App. at 943 (quoting *Tanner Elec. Coop. v. Puget Sound Power & Light Co.*, 128 Wn.2d 656, 674, 911 P.2d 1301 (1996)). Here the trial court had to consider extrinsic evidence and had to resolve the multiple ambiguities in the additional-rent clause, thus making the trial court's interpretation of paragraph 2 of the lease as one of fact.

If a contract remains ambiguous after examining extrinsic evidence, the contract will be construed against the non-favored party, e.g., the insurance company, lessor or drafter. See, *Denny's Restaurants, Inc. v. Security Union Title Insurance Co.*, 71 Wn. App. 194, 209, 859 P.2d 619 (1993) (ambiguity construed in favor of insured); *Rouse v. Glascam Builders, Inc.*, 101 Wn.2d 127, 135, 677 P.2d 125 (1984) (ambiguity construed in favor of non-drafter); *Luna v. Gillingham*, 57 Wn. App. 574, 581, 789 P.2d 801, *review denied*, 115 Wn.2d 1020 (1990) (ambiguity construed in favor of attorney's client); *McGary v. Westlake Investors*, 99 Wn.2d 280, 287, 661 P.2d 971 (1983) (ambiguity construed in favor of lessee). The trial court here

properly construed the additional-rent provision in the lease against Azalea as the lessor and drafter of the lease.

An appellate court may also affirm the trial court on any correct ground, even those the trial court did not consider. *Nast v. Michels*, 107 Wn.2d 300, 308, 730 P.2d 54 (1986). The trial court's findings and conclusions in this case are eminently reasonable, properly supported and should be sustained on this appeal.

B. The Trial Court Correctly Construed the Ambiguous Language in the Additional-Rent Clause to Refer to New Construction.

1. Legal Authority Supports the Trial Court's Conclusion of Law #14 that the Term "Capital Improvements" Refers to New Construction.

The trial court did not adopt wholesale the IRS definition of a "capital improvement," but adopted a more carefully crafted approach to determine that a "capital improvement" as that term was used in the lease "refers not to repairs or maintenance, but in the sense or similar to usage in IRS regulations, i.e., to improvements of a capital nature, such as new buildings, facilities, permanent improvements, or betterments made to increase the value of property" (CP 457, COL 9).

The trial court further specifically concluded that paragraph 2 of the lease was ambiguous, and that such ambiguity should be construed against Azalea as the drafter of the lease, and considering

the context in which the lease was negotiated and signed, "the Court concludes that a 'capital improvement' as used in the leases refers to a new capital improvement, and not the replacement or repair of an existing capital improvement" (CP 458, COL 14).

As determined by the trial court, the "apparent rationale for the tenants' paying 'additional rent' for funds the Landlord expended on 'capital improvements' is that (1) the tenants would benefit from new facilities, e.g., swimming pool, nature trail, new roads, enlargement of the clubhouse, etc., and (2) the landlord would receive a gain or profit, i.e., not only the value of the asset itself (and presumably the increased value of the park), but also the 12% profit on the monies it expended on capital improvements" (CP 457, COL 12).

These conclusions are supported by *Ocean Club Condominium Association, Inc. v. Gardner*, 318 N.J.Super. 237, 239, 723 A.2d 623, 624 (1998). That case involved a claim by condominium owners that the developer had an obligation to budget and collect common expenses, including "reserves for deferred maintenance, replacement and capital improvements of the common elements." The term "capital improvements" was undefined in any relevant statute or documents executed by the parties. The court held that:

> " . . [A] capital improvement contemplates the creation of some new common facility or installation;

> that is, something beyond the items which were part of the original construction. An example would be the installation of a tennis court where none existed previously. In contrast, replacement and repair relates to common elements already in existence. This distinction is not only reinforced by the Public Offering Statement, even the expert for the defense conceded that such a distinction exists."

Ocean Club, supra, 318 N.J.Super. 237, 239, 723 A.2d 623, 624. This distinction makes sense from a policy point of view, as the benefit to the property owner of a capital improvement is less direct than the benefit to the occupiers of the property. *Id.*

The trial court's construction of the ambiguous term "capital improvements" was therefore reasonable in light of *Ocean Club.*

2. The Term "Capital Improvement" in the Lease is Ambiguous and Should be Construed Against the Drafter.

The term "capital improvement" as used in ¶ 2 of the lease has inherent ambiguity, as it is not defined in the lease and has multiple potential and reasonable meanings. Azalea in its summary judgment motion argued in support of at least three different meanings of the term "funds expended on capital improvements," e.g., (1) funds spent "on" or "in connection with" capital improvements; (2) funds spent for any item which makes a capital improvement (a) increase its value or (b) last longer; and (3) an outlay of funds "to acquire or improve a fixed asset," citing *Black's Law Dictionary* (CP 32-33). Of course, the

provision at issue could also mean (4) "funds spent on improvements which would qualify as capital expenditures under the Internal Revenue Code and as interpreted by the IRS at the time the funds are expended."[11]

"A contract provision is ambiguous when its terms are uncertain or when its terms are capable of being understood as having more than one meaning." *Mayer v. Pierce Medical Bureau*, 80 Wn. App. 416, 421, 909 P.2d 1323 (1995). Depending upon the context, a "capital improvement" could encompass many different inconsistent activities. See, *McKinsey v. C.I.R.*, 48 T.C.M. (CCH) 1225, 11500-80 ("We have discussed on innumerable occasions the demarcation between currently deductible repairs and depreciable capital expenditures. * * * * Although it is an easy enough task to describe in abstract terms that line of demarcation, applying that line in a particular factual context, at times, can prove exceedingly difficult.").

Moreover, Azalea's own park manager has conceded the ambiguity of the term "capital improvements," stating that "[y]ou are likely to find many different answers when trying to define the difference between capital improvements and maintenance depending

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[11]This is the theoretical definition that on appeal, in contrast to what it argued to the trial court, Azalea now wishes to establish as the definition of the ambiguous term "capital improvements."

on who you ask" (Tr. Ex. 5). Azalea should not profit by using an ambiguous term in its lease and later giving that term an interpretation that serves its self interest.

Furthermore, under general principles of contract interpretation, "the reviewing court construes ambiguities in the agreements against the drafter." *Rouse v. Glascam Builders, Inc.*, 101 Wn.2d 127, 135, 677 P.2d 125 (1984); *Guy Stickney, Inc. v. Underwood*, 67 Wn.2d 824, 827, 410 P.2d 7 (1966); *Mendez v. Palm Harbor Homes, Inc.*, 111 Wn. App. 446, 45 P.3d 594 (2002). "If the contract is ambiguous, the doubt created by the ambiguity will be resolved against the one who prepared the contract." *Felton v. Menan Starch Co.*, 66 Wn.2d 792, 797, 405 P.2d 585 (1965). Even more specifically, ambiguities in leases are construed against the drafter, here the landlord. *McGary v. Westlake Investors*, 99 Wn.2d 280, 287, 661 P.2d 971 (1983). The rationale for this rule is that the party who drafts the contract (1) is more likely to protect his or her own interests over the other party's interests; and (2) may intentionally leave a term ambiguous, hoping to decide at a later date what meaning the term should hold. *Restatement (Second) of Contracts*, § 206(a) (1981). The ambiguous provision "[a]s additional rent, the Owner shall be compensated by Resident (1/97th per space) on the basis of

computation of a twelve percent (12%) rate of return for funds expended on capital improvements" should therefore be construed against Azalea. Azalea should not profit by using an ambiguous term in its lease and later giving the term a self-serving interpretation.

3. The Meaning of "Capital Improvements" in the Lease Is Not Defined by IRS Regulations, and Was Correctly Interpreted to Apply to New Construction.

In the context of this case, where Azalea was trying to fill up the park with long-term tenants, it is not reasonable for prospective tenants to assume that they would have to pay additional rent for Azalea's costs in maintenance of the park. The sales fliers used to attract prospective tenants to the park stated that one of the benefits of a long-term lease is that the tenants would not have to pay for maintenance of existing features of the park. The fliers stated that one of the benefits of a long-term lease is that the Tenants would not have to pay for maintenance of the roads, common areas or the clubhouse (Tr. Ex. 2; App. B). The common and ordinary meaning of the word "maintenance" is "the work of keeping something in proper condition; upkeep." *American Heritage Dictionary of the English Language* (4th ed. 2000) 1055. A prospective tenant would understand the term "maintenance" in such a way, and not in the technical sense as used in IRS regulations.

Accordingly, Azalea's costs in repairing the roof on the clubhouse, for example, or repairing a fence or the front gate would be viewed by a reasonable tenant as part of the normal, on-going maintenance performed by Azalea to keep a high-end park in a proper condition.

In addition, a landlord would normally try to expense such costs in the year paid to get the maximum tax deduction, as opposed to capitalizing the cost over several years. But here, owing to the ambiguities in the lease, Azalea has a self-serving incentive to try to capitalize such costs by classifying them as "capital improvements," while costs associated with maintaining existing amenities of the park might be considered related to "capital improvements" under a technical reading of the Internal Revenue Code or IRS regulations. Those regulations are not known or understood by the average person. The average tenant would reasonably assume that Azalea was going to maintain the park while charging the rent as increased by the CPI, and that Azalea would bill *additional rent* only for *additional facilities* that it would provide. This would be fair, as the tenants would get the additional benefit of the use of the new facilities. Park tenants get no *additional* benefit from Azalea's replacement of the roof on the clubhouse, replacing a section of fence or replacing the entrance gate

to the park. Park tenants get no *additional* benefit from the landlord's resurfacing the roads in the park.[12] Furthermore, such maintenance is required per the MHLTA. RCW 59.20.130(9).

Thus, the interpretation of capital expenditures in the lease as relating to "new" facilities is quite reasonable given the circumstances of this lease. Such an interpretation follows from the Tenants' understanding that they would not have to pay for ongoing maintenance of the park and minimizes Azalea's future attempts to send invoices to the tenants for additional rent for activities that fall under the ambiguous language of the lease. Notwithstanding Azalea's previous arguments that IRS definitions for tax purposes do *not* apply to the lease, the trial court's interpretation also construes the ambiguous term "capital improvements" in favor of the Tenants in such a way that the landlord is less likely to derive undue benefit from his selection of the ambiguous term in the lease.

4. Contrary to Azalea's Arguments, the Tenants Did Not Assert at Trial that the Term "Capital Improvements" in the Lease Was Defined by IRS Regulations or that Improvements to Existing Capital Improvements Were Also Capital Improvements.

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[12]The Tenants never agreed, as argued by Azalea (App. Br. 13) that repaving the roads in the park would constitute a capital improvement. Tenants' counsel argued that *assuming* that repaving the road were a capital improvement, then the 12% rate of return formula in the lease did not yield an absurd result (RP 11/21/14 at 70).

The case involved, among other things, two interconnected issues to be resolved by the trial court, namely construing the term "capital improvement" and answering the question of whether the seal coating is a "capital improvement." In its arguments on appeal, Azalea confuses these two issues; more specifically, it confuses the record on seal coating and uses that as a basis to support its appellate argument on the broader issue of the meaning of the term "capital improvement." It also omits from its arguments mention of extrinsic and other evidence put forward by the Tenants that is significant in supporting the trial court's COL #14.

As a framework for construing the term "capital improvement," the trial court used the context rule for analysis as laid out in Conclusion of Law #3 (CP 456):

> "The Court is required to look at the context rule for ascertaining the parties' intent and interpreting written contracts. To determine the intent of the parties, the court must look at the contract as a whole, the subject matter and the objective of the contract, all the circumstances surrounding the making of the contract, the subsequent acts and conduct of the parties to the contract, and the reasonableness of respective interpretations of each party".

The trial court faithfully observed this framework and arrived at a construction of "capital improvement" that is reasonable (RP 10/21/14

at 14, 32-33, 37). The trial court reviewed a number of authoritative definitions for "capital improvement," not only to establish that an ambiguity existed, but to assist the trial court in ultimately arriving at a construction of "capital improvement" appropriate to the lease at hand. The trial court also considered extrinsic evidence, relevant case law and applicable statutes

In its Assignment of Error 1, Azalea suggests that the parties did not dispute that "the term 'capital improvement' in the lease agreement applies to both improvements to existing assets and construction of new assets", and questions whether COL #14 "contradicts other findings and conclusions made within the same order" (App Br 2). Azalea is mistaken on both of these points.

A. Azalea inappropriately cites RP 10/21/14 at 91 to support its statement that "the tenants agreed that the term 'capital improvement' could apply to projects involving existing assets." App. Br. 5. This citation is a page from Azalea's closing argument, and there are no statements on the cited page that can reasonably be construed to mean the same as the quoted statement.

B. Azalea inappropriately cites RP 10/21/14 at 70-73 to support its statement that "tenants offered testimony that, for example, laying down a new coat of asphalt on the existing roadway

would be a capital improvement, but seal coating was maintenance." App. Br. 5. This statement ignores the context and purpose of this portion of testimony. This testimony of Azalea's tax accountant does not establish the meaning of "capital improvement"; rather it establishes that for tax purposes Azalea incorrectly classified the seal coating as a capital expenditure, as opposed to a repair or maintenance, in an attempt to make the Tenants pay for the full cost of the repair. Moreover, Azaela's counsel was careful to establish that this testimony was "limited to the extent [the witness] prepared income tax returns" and that the witness had nothing to do with the drafting or reviewing of the lease for Azalea Gardens (RP 10/21/14 at 73).

Furthermore, there are other places in the record that clearly show the Tenants offered no such testimony. The Tenants flatly stated: "The depreciation deduction allowed by the IRS for the roads–*assuming they are capital improvements*–provides the fund by which the park owner can replace the roads at the end of their useful life" [italics added] (CP 248). The Tenants therefore did not concede that roads were capital improvements or that additions to roads, e.g, new asphalt, were also capital improvements.

In another place the Tenants argued, for example, that *assuming* the roads were capital improvements, then a certain result

would follow (CP 296). There the Tenants did not argue at trial that a layer of asphalt applied to the roads or a replacement to an existing asset was a capital improvement.

C. Azalea inappropriately cites CP 132 and RP 10/21/14 at 78, 81 to support its statement that "tenants argued that the definition of the term 'capital improvement' in the lease should be interpreted as consistent with the IRS definition of the term" (App. Br. 6). There are no statements on the cited pages that can reasonably be construed to mean the same as the quoted statement. Instead, the cited pages are focused on making the argument that seal coating is not a capital improvement, and for that argument a dispositive definition of capital improvement is not required.

In addition, the Tenants specifically argued that the "interpretation of the Internal Revenue Code by the IRS and courts are relevant to, *although not necessarily dispositive of*, the meaning of 'capital improvements' in the leases in question . . . " [italics added] (CP 295), and that IRS guidelines were "highly relevant" to determining the interpretation of the term "capital improvements" (RP 10/21/14 at 38). "Highly relevant" in context does not mean dispositive, and in any event was argued in the context of whether seal coating was maintenance or a capital improvement, not whether IRS

guidelines established the meaning of "capital improvements" as that term was used in the lease.[13]

D. Azalea incorrectly states that "neither party presented evidence that they understood the term 'capital improvement['] to mean only brand new construction" (App Br. 5). The Tenants actually did cite case law in the condominium context that defines "capital improvement" as "the creation of some new common facility or installation" (CP 296-97). Also, Tenants' counsel made this point in closing argument: "I think most tenants would assume what's there is there and it's only the new stuff that the park builds, that they would get the additional benefit from, that they would then pay an extra amount. And there are cases that I've cited in the trial brief that actually say that, that make that distinction in the condominium context" (RP 10/21/14 at 97).

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[13]In final argument Tenants' counsel summarized the IRS distinction between "putting" and "keeping" an asset in operating condition, but did not argue that the lease provision in paragraph 2 was co-extensive with this distinction (RP 10/21/14 at 78). The statement that "I think everyone agrees, asphalt is a capital asset" was made by Azalea's counsel, not by Tenants' counsel (*Id.* at 91), and is nothing more than an opinion or mere argument, and is certainly not binding on Tenants. Whether asphalt would be a capital asset depends upon all the circumstances, e.g., how much asphalt is being discussed, where it is located, what its use is, who the owner is, and numerous other factors. That is why the determination of a capital asset is in many cases difficult: there are no easy rules determining what is a capital asset for all situations and circumstances.

Moreover, the Tenants suggested throughout the litigation that paragraph 2 of the lease applied to new construction (CP 169, 181, 235, 286, 449-450).

E. Significantly, Azalea omits mention of the sales fliers used to attract tenants to the park stating that the homeowner did not have to pay for "[m]aintenance of the streets[,]" the clubhouse and common areas, and pointing out that such a provision was a benefit of long-term lot leases. Such references to maintenance contrast with the concept of capital improvements, providing compelling evidence for the Tenants' reasonable belief with regard to the scope of the term "capital improvement" at the time the lease was entered into (Tr. Ex. 2).

F. Significantly, Azalea omits mention of its statutory duty to "[m]aintain the common premises", including the specific duty to "[m]aintain the roads within the mobile home park in good condition." RCW 59.20.130(1); RCW 59.20.130(9).

G. Significantly, Azalea omits mention of evidence that it had succumbed to the temptation of exploiting the ambiguity in its leases by mis-characterizing the seal coating as the laying of asphalt, leading its accountant to treat the work as a capital expenditure under IRS rules, and thereby creating a pretext of propriety for the improper

charging of the cost of the seal coating back to the Tenants (FOP #22 - #24).

H. Significantly, Azalea omits mention that it had rejected the definition of the term "capital improvement" based on the Internal Revenue Code, even though it had provided this very interpretation of "capital improvement" to the Tenants in the FAQ sheet (CP 33, fn 3; 153-54; 268; 311-312; Tr. Ex. 5).

I. Significantly, Azalea does not mention the existing perverse incentive, which it identified in its briefs, that would be present under an IRS-type definition of "capital improvement," stating that an extension of the Tenants' legal argument would be that "the lease allows Azalea to remove and reinstall the existing roadways and pass on that much higher expense to the tenants, but not the much lower expense to sealcoat the roadway to delay tearing up the roads and doing them over" (CP 218, 316). The Tenants responded to this argument by asserting that such action on the part of Azalea would not be acting in good faith, which is an express obligation imposed on the parties by the MHLTA under RCW 59.20.020 (CP 298).

J. Significantly, Azalea omits to discuss the glaring ambiguities in the additional-rent clause and the canon that ambiguities in the lease are construed against Azalea.

The trial court weighed these many contextual factors, alongside the well-established case law that resolves ambiguous contract terms against the drafter, in its construction of the term "capital improvement." The construction provides a new clarity that will reduce future disputes related to the term "capital improvement," as well as will reduce incentives on the part of Azalea to act in bad faith, by foreclosing ambiguity that could be exploited for financial gain.

5. Interpreting Capital Improvements to Include Capital Improvements Mandated by a Government Agency Is Reasonable, Benefits Azalea, Was Argued to the Trial Court by Azalea and is at Most Harmless Error.

Azalea argues that "[a] finding that the parties intended a different meaning of 'capital improvement' depending on whether the project is initiated by Azalea or a government agency is unsupported by the record and has no basis in the text of the lease agreement. CP 163. The lease draws no distinction between capital improvements ordered by an agency or those chosen by Azalea." App. Br. 15.

In fact, paragraph 2 of the lease identifies capital improvements in two different categories "...capital improvements either mandated by a governmental entity or deemed necessary by the Owner...". Furthermore, it was Azalea's motion for reconsideration (CP 444) that led the trial court to make a distinction in the definition in the case of

work mandated by a governmental agency (COL #13).

The trial court, in its interpretation of "capital improvement," included a qualification that "a capital improvement mandated by a government agency, however, need not relate to a new capital improvement" (CP 458, COL #13) There are at least two reasons supporting this rationale: First, the work that would arise from a mandate of a government agency could not be a result of a financial incentive on the part of Azalea. In such case Azalea by definition would be required to comply with the government mandate.

Second, government mandates would involve non-voluntary expenditures by Azalea. If Azalea is mandated to spend money on certain improvements, it seems more fair to require the Tenants to pay the cost.

Azalea initially raised the argument about capital improvements required by governmental mandate in its motion for reconsideration, and the trial court responded by replacing Conclusion of Law #13 thereafter. Thus the trial court was responding to an argument made by Azalea, and Azalea cannot complain about that now. Azalea benefits from the trial court's interpretation, because it broadens the the categories of capital improvements for which Azalea can seek a form of reimbursement through a "rate of return" from the

Tenants under paragraph 2 of the lease. If anyone should complain about the trial court's interpretation regarding governmental mandates, it should be the Tenants. Thus, the interpretation involving capital improvements mandated by a government agency is at most harmless error.

6. The Trial Court's Interpretation Upholds the Reasonable Understanding of the Parties.

Before he purchased a home in the park, plaintiff McIntosh was advised in the form of a flier by the salesman of the home he ultimately purchased as follows (RP 10/21/14 at 41; Tr. Ex. 2):

"The developer, not the homeowner, pays for all of the following:

❦ Maintenance of entry, clubhouse and common areas

❦ Maintenance of streets, sidewalks, electronic gates and community lighting[.]"

Given this kind of information, a reasonable tenant would conclude that Azalea was paying for ongoing maintenance necessary to keep the park in proper operating condition, and that the "capital improvements" for which he was paying a 12% return would involve new construction or new facilities, something which would provide him an additional benefit–not for expenditures on existing facilities. It is simply not reasonable for Azalea to assume that tenants

purchasing homes in the park would understand anything other than the ordinary meaning of the word "maintenance," and not any technical meaning or complexities contained in the Internal Revenue Code. Accordingly, the trial court's interpretation of the additional-rent clause in the lease comports with the parties' reasonable understanding of the terms expressed therein.

7. Azalea Did Not Prevail on Any Major Issue.

Azalea argues that it substantially prevailed on an issue, crediting its declaratory judgment action for the inclusion of the definition of "capital improvement" in Conclusion of Law 14 (CP 457-458). App Br 19. The broad definition of "capital improvement" offered by Azalea at trial–anything which extends the life of the asset--was rejected by the trial court (CP 386-403). Azalea could not have prevailed, as the trial court dismissed Azalea's counterclaims with prejudice (CP 519).

The trial court's dismissal notwithstanding, Azalea misstates that it "asked for declaratory judgment regarding the definition of the term 'capital improvement' in the lease" in its counterclaims. App. Br. 16. In fact, Azalea's counterclaims make no mention of the term "capital improvement," much less ask the trial court to interpret the term (CP 15). The counterclaims that Azalea actually did make are so

broadly worded as to be vague and now, reminiscent of how some might interpret horoscopes, Azalea is back-ending an association of the trial court's findings with those broadly worded counterclaims (CP 15). App. Br. 19. The Tenants had immediately identified the vagueness of Azalea's counterclaims, and in their answer to Azalea's counterclaims raised, among other issues, that (1) "[Azalea's] counterclaim fails to state a claim upon which relief may be granted" and (2) "the relief sought is too vague and ambiguous to be enforced" (CP 20), and on that basis (among others), the Tenants requested the trial court to dismiss Azalea's counterclaims with prejudice (CP 21), which the trial court ultimately did in its final judgment (CP 519).

RCW 4.84.330 provides that the prevailing party in a contract action is entitled to attorney fees if the contract authorizes such an award.[14] *Phillips Bldg. Co., Inc. v. An*, 81 Wn. App. 696, 701, 915 P.2d 1146 (1996). Under the statute, the term "prevailing party" means the party in whose favor final judgment is rendered. RCW 4.84.330. Azalea was not afforded any relief on any issue in the trial court and

[14] RCW 4.84.330 provides: "In any action on a contract or lease ... where such contract or lease specifically provides that attorney's fees and costs, which are incurred to enforce the provisions of such contract or lease, shall be awarded to one of the parties, the prevailing party, whether he is the party specified in the contract or lease or not, shall be entitled to reasonable attorney's fees in addition to costs and necessary disbursements."

obtained no judgment in its favor, so it cannot be considered a prevailing party.

8. Azalea's Fears Concerning the Application of the Doctrine of Collateral Estoppel Are Misplaced.

Azalea argues that the definition of "capital improvements" must be changed now, because the Tenants are likely to argue the doctrine of collateral estoppel in the future regarding which projects are classified as "capital improvements." App. Br. 16. This argument fails.

The doctrine of collateral estoppel "prevents relitigation of an issue after the party estopped has had a full and fair opportunity to present its case." *Hanson v. The City of Snohomish*, 121 Wn.2d 552, 561, 852 P.2d 295 (1993). The purpose of the doctrine is to promote the policy of ending disputes, to promote judicial economy and to prevent harassment of and inconvenience to litigants. *Id.*

One of the requirements which must be met in applying the doctrine of collateral estoppel is that "application of the doctrine must not work an injustice." *Hanson,* 121 Wn.2d at 562; *Christensen v. Grant County Hospital District No. 1*, 152 Wn.2d 299, 307, 96 P.3d 957 (2004). Accordingly, whatever hypothetical future situation which might arise involving the assertion of collateral estoppel would have to involve the question of whether application of the doctrine would work an injustice. If application of the doctrine would work an injustice,

then the doctrine would not be applied. So as of this date, in the absence of any specific factual pattern to analyze, it cannot be determined whether the doctrine of collateral estoppel would apply or not to some future situation. Accordingly, Azalea is really asking this court to speculate about the application of the trial court's ruling in this case to some future unknown case.

9. Azalea Should Not Be Permitted to Raise New Issues in its Reply Brief.

Appellate courts do not consider arguments raised for the first time in an appellant's reply brief. *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992). Therefore, this court should not consider any new arguments raised in Azalea's reply brief.

C. The Amount of Attorney's Fees Awarded to the Tenants Was Within the Discretion of the Trial Court.

An attorney fee award is reviewed for an abuse of discretion. *Chuong Van Pham v. City of Seattle*, 159 Wn.2d 527, 528, 151 P.3d 976 (2007). Discretion is abused when the trial court exercises it on untenable grounds or for untenable reasons. *Id.* Here there was no abuse of discretion. The trial court carefully reviewed the Tenants' fee application, patiently considered Azalea's objections at a lengthy hearing (RP 11/26/14), and decidedly reduced the fee application from

$49,743.75 to $37,432.50 (CP 498). Azalea has failed to meet its burden to show any abuse of the trial court's discretion.

Furthermore, although the written findings do not set forth in great detail the trial court's consideration of all the arguments made by Azalea in opposing the Tenant's attorney fee request, in the absence of a written finding on a particular issue, an appellate court may look to the oral opinion of the trial court. *Matter of Marriage of Griffin,* 114 Wn.2d 772, 777, 791 P.2d 519 (1990). Here the trial court's oral rulings amply reflect what the trial court did and provide an adequate basis for review.

D. The Tenants Are Entitled to Attorney's Fees on Appeal.

Paragraph 27 of the leases provides that the prevailing party "[i]n any actions [sic] arising out of this Agreement, including eviction" shall be entitled to reasonable attorney's fees and costs (CP 329). Where attorney's fees are provided in a contract to be awarded to the prevailing party, reasonable fees must be awarded. *Singleton v. Frost,* 108 Wn.2d 723, 733, 742 P.2d 1224 (1987). The prevailing party is one in whose favor the judgment is entered. *Kysar v. Lambert,* 76 Wn. App. 470, 493, 887 P.2d 431 (1995); Silverdale Hotel v. Lomas & Nettleton, 36 Wn. App. 762, 773, 677 P.2d 773 (1984); *Moritzky v. Heberlein,* 40 Wn. App. 181, 183, 697 P.2d 1023 (1985).

In addition, RCW 59.20.110 provides that in any action arising out of the MHLTA, "the prevailing party shall be entitled to reasonable attorney's fees and costs." RCW 59.20.110.

Where a statute authorizes fees to the prevailing party, they are available on appeal as well as in the trial court. *Eagle Point Condominium Owners Association v. Coy*, 102 Wn. App. 697, 716, 9 P.3d 898 (2000).

This court should therefore order that the Tenants are entitled to attorney's fees on appeal.

V. CONCLUSION

For the reasons set forth above, this Court should affirm the trial court's interpretation of the additional-rent clause and judgment, and should award to Tenants their attorney's fees and costs incurred in this appeal.

RESPECTFULLY SUBMITTED this 1st day of June, 2015.

Law Offices of Dan R. Young

By Dan R. Young
Dan R. Young, WSBA # 12020
Attorney for Respondents

DECLARATION OF SERVICE

I, Dan R. Young, declare to be true under penalty of perjury under the laws of the State of Washington as follows:

1. I am an attorney representing the respondents Neal McIntosh et al. in this action.

2. On June 1, 2015, I sent by the USPS, first class mail with pre-paid postage affixed, a copy of the foregoing Respondent's Brief to the following:

Olsen Law Firm PLLC
Walter H. Olsen, Jr., Esq.
205 S. Meridian
Puyallup, WA 98371

Sidney Tribe, Esq.
Talmadge/Fitzpatrick/Tribe
2775 Harbor Avenue SW
Third Floor, Suite C
Seattle, WA 98126

Dated: June 1, 2015, at Seattle, Washington.

Dan R. Young

Dan R. Young

AZALEA GARDENS
MANUFACTURED HOME LONG TERM LEASE AGREEMENT

THIS AGREEMENT is made in duplicate and entered into between AZALEA GARDENS, as Landlord, and NEAL & MARILYN MCINTOSH, as Tenant(s) and Owner(s) of the manufactured home.

1. Term:
Landlord leases to Tenant and Tenant leases from Landlord Lot No. 2 (hereinafter the Manufactured Home Lot/or the "Homesite") in Azalea Gardens (hereinafter the "Community"), located at 19525 100th Ave. Ct. E., Graham, Washington 98338, a term of twenty (20) years commencing on the _____ day of _____, 20____. Notwithstanding the foregoing, the term of this lease is subject to earlier termination under the circumstances described in the section entitled "Assignment." Tenant and Landlord expressly agree that upon the expiration of the 20-year-term, this Rental Agreement shall automatically renew for a period of one month, and shall thereafter be a tenant from month to month, unless Tenant requests an additional one (1) year term prior to the end of the original term.

2. Monthly Lease Amount:
Resident agrees to pay a Lease Payment of $$418.00 per month during the term of this agreement. The lease payment shall be paid at Azalea Gardens' Manager's Office, or be mailed to 19525 100th Ave. Ct. E., Graham, Washington 98338, or such other location as Azalea Gardens may designate from time to time.

The lease rate shall be subject to an adjustment on January 1st of each year, following the beginning of the term and annually thereafter ("the adjustment date") as follows: The base for computing the adjustment is The Consumer Price Index All Items (1982-84 = 100) For Consumers, Seattle-Tacoma ("The Index") for the month nearest the commencement of the term ("Beginning Index").

An Additional adjustment shall be made annually on April 1st of each year to reflect 1/12 of 1/97th of the cumulative real estate tax increases or decreases over the preceding year's real estate taxes. The adjustment for any tax increase/decrease may be made retroactively to the previous January 1st.

As additional rent, the Owner shall be compensated by Resident (1/97th per space) on the basis of computation of a twelve percent (12%) rate of return for funds expended on capital improvements either mandated by a governmental entity or deemed necessary by Owner. The charge to the Residents shall be allocated equally to each homesite. The twelve percent (12%) rate of return to the Owner shall be for a period not to exceed the period of depreciation of such improvement.

In addition to the base rent set forth above, Resident shall pay ~~extra vehicle rent~~ $35.00/mo extra recreational vehicle storage charges as set forth by separate agreement if facilities for that storage are provided by Landlord

Limited Recreational Vehicle Storage:
Recreational Vehicle storage charges shall be thirty-five ($35.00) per month per space, plus electric, if used and may be adjusted in the future. Residents will pay the monthly costs of the following services indicated by Azalea Gardens and Resident's initials. Failure of Resident to timely pay such costs shall be deemed a default of this lease.

		Initials Owner/Resident
(a)	Sewer $21.00 + 418.00 = $439.00 + $35.00 = $474.00	____/____
(b)	Water	____/____
(c)	Cable	____/____
(d)	Garbage Pick Up	____/____
(e)	Electricity	____/____
(f)	Heat	____/____
(g)	Gas	____/____
(h)	Telephone	____/____

3. Additional Charge:
In addition to the monthly rental, Tenant agrees to pay to Landlord the following charges:

Pierce County Sewer District has mandated that Azalea Gardens collect the monthly sewer charge from each Resident. This charge can be added to each month's lease payment in the amount of $21.00 or by a separate check made out to Azalea Gardens. This rate is subject to change based on the sewer district's current rate.

4. Utilities and Services:
Tenant shall in addition to the monthly lease payment, pay for all utilities supplied to the Manufactured Home Lot. Tenant shall be responsible for their individual sewer step system which is an integral part of their home; this includes periodic preventive maintenance, repair of sewer step system pump and sewer step lines, and periodic pumping of holding tank located on said manufactured home lot.

Typical costs? Certain can not be done

5. Facilities:
The following facilities will be available to Tenant during the tenancy: Clubhouse, and common area; RV storage will be available at additional charge. $25.00/mo.

6. Late Charges:
Tenant agrees to pay a fee of Twenty Five Dollars ($25.00) if a Tenant's payment by check is returned for any reason. If full monthly rent, fees and additional charges are not postmarked or received by the Fifth (5th) day of the month, Tenant shall pay a late fee of Twenty-Five Dollars ($25.00) and an additional fee of Two Dollars ($2.00) per day thereafter during such month until the full monthly rent, fees and additional charges are received. The late charge will be in addition to and part of the rent due for that month. A

returned check resulting in Landlord's late receipt of rent payment shall result in the assessment of both late charges and the returned check fee.

7. Place of Payment:
Rent and all additional charges shall be paid to Azalea Gardens' office at 19525 100th Ave. Ct. E., Graham, Washington 98338 or to such other person or at such other place as Landlord may from time to time designate by written notice.

8. Occupants:
Tenant shall not give accommodation to any roomers or lodgers, or permit the use of the Manufactured Home Lot for any purpose other than as a residence and as the location of one manufacture home and its accessory buildings for the exclusive use of the following named persons: NEAL E. & MARILYN J. McINTOSH

9. Pets:
Tenant agrees to have no animals or pets of any kind on the Manufactured Home Lot or in the Community, other than those designated on the Pet Agreement signed by Landlord and Tenant.

10. Responsibilities:
Tenant agrees: (a) to keep the Manufactured Home Lot in a clean and sanitary condition: (b) to comply with all applicable federal, state and local laws, regulations, and ordinances pertaining to the Manufactured Home Lot and the manufactured home located thereon, and appurtenances, and to save Landlord harmless from all fines, penalties, and costs for violations or noncompliance by Tenant with any laws, requirements or regulations, and from all liability arising out of any violation of noncompliance; (c) to properly dispose from the manufactured home and Manufactured Home Lot all rubbish, garbage, and other organic or flammable waste, in a clean and sanitary manner at reasonable and regular intervals, and to assume all costs of extermination and fumigation for infestation caused by Tenant; (d) to immediately notify Landlord of any damage to the Manufactured Home Lot or to the Community caused by acts of neglect of Tenant or Tenant's guests. Unless otherwise agreed, Landlord shall repair the damage and charge Tenant for the repair which Tenant agrees to pay to Landlord by the next monthly rental payment due date, or on terms mutually agreed in writing by Landlord and Tenant; (e) to not intentionally or negligently destroy, deface, damage, impair or remove any facilities, equipment, furniture, furnishings, fixtures, or appliances provided by Landlord, or permit any member of Tenant's family, invitee, or licensee, or any person under his/her control to do so; (f) to not permit a nuisance or common waste; and (g) to comply with all Community Rules and Regulations. TRASH ON THURSDAY GREEN WASTE?

11. Rules and Regulations:
Tenant acknowledges receipt of a copy of the Community Rules and Regulations which Tenant agrees to comply with the terms and conditions of Addendum "A". Tenant further agrees that Landlord may, upon thirty (30) day's written notice, make changes or additions to the Rules and Regulations stated herein.

12. Fees for Guests: N/A

Tenant agrees to pay a fee of Three Dollars ($3.00) per day for each guest who remains within the Community for more than fifteen (15) days in any sixty (60) day period.

13. Termination-Eviction:

In the manner provided by law, this Rental Agreement may be terminated by Landlord, and Tenant may be evicted. If Tenant is evicted for any reason, Tenant expressly agrees to pay all rent, additional charges, fees, and other costs due under this Agreement during a pending eviction proceeding and until Tenant vacates and removes Tenant's manufactured home and other personal property from the Manufactured Home Lot. Tenant expressly waives any right to not pay rent, additional charges, fees or other costs during any legal proceeding undertaken to evict Tenant.

14. Holding Over:

If Tenant continues in possession of the Manufactured Home Lot after termination of this Rental Agreement without the express written consent of Landlord, Tenant agrees to pay Landlord the monthly rental, computed and prorated on a daily basis for each day Tenant remains in possession and agrees to comply with all terms of this Rental Agreement.

15. Improvements:

Tenant agrees not to make or permit any construction, alteration, additions, painting, or other improvements to the Manufactured Home Lot, nor to permit placement of a storage shed thereon, without the prior written consent of Landlord.

16. Guest Parking:

Tenant agrees that Tenant's Guests shall park their vehicles only in Tenant's assigned parking area or in areas designated for guest parking. In no case will tenant's guest obstruct or violate other tenants' parking or property rights. Any guest's vehicles parked in excess of N/A (N/A) hours must be properly identified by placement of Tenant's name and Lot number where such guest is visiting to prevent impound or towing. Tenant agrees to pay a fee of N/A Dollars ($ N/A) per day per vehicle for each violation of the provisions of this Rental Agreement and the Community Rules and Regulations relating to guest parking. Tenant agrees to pay a fee of N/A Dollars ($ N/A) per day for each guest's vehicle which remains in the community for more than N/A days. Guest parking fees shall be payable by Tenant to Landlord on the next monthly rental payment due date. Tenant hereby authorizes Landlord to tow or impound, at Tenant's expense, any vehicle of Tenant's guests which is not parked in accordance with the terms of this Rental Agreement, provided that the Landlord must first attempt to notify the owner thereof or Tenant.

17. Assignment:

This Rental Agreement shall not be Assignable by Tenant, except as provided in RCW 59.20.073 and only to a person whom Tenant sells or transfers title to the manufactured home on the Manufactured Home Lot, subject to the approval of Landlord after fifteen

(15) days' written notice by Tenant of such intended assignment. Landlord shall approve or disapprove of the assignment of this Rental Agreement on the same basis that Landlord approves or disapproves of any new tenant or manufactured home. Upon any assignment by Tenant or Tenant's leasehold interest in the homesite, this Rental Agreement shall automatically convert to a one (1) year lease beginning on the effective date of the assignment. The minimum monthly rent during the first year of such term shall be the rent currently charged under the lease. After December 31 of the year of assignment, the rent shall be the rent charged by landlord following the most recent rent increase for the park and will be subject to adjustment on January 1 of each year. Landlord shall assign its interest in this Rental Agreement to any third party who purchases in the Community. This paragraph shall apply to all voluntary transfers and involuntary transfers of Tenant, including a transfer between married tenants pursuant to a divorce decree, separation agreement, or similar document or order, or a transfer in a bankruptcy or other insolvency proceeding.

18. Subletting:

Tenant shall not sublet or rent out any part of Tenant's manufactured home or Manufactured Home Lot.

19. Liability and Indemnity:

Tenant agrees that all of Tenant's personal property in the Community shall be at the risk of Tenant. Tenant further agrees that Landlord shall not be liable for, or on account of, any loss or damage sustained by actions of any third party, fire, theft, water, or the elements, or for the loss of any property from any cause from the Manufactured Home Lot, or any other part of the Community; nor shall Landlord be liable for any injury to Tenant, Tenant's family, guests, employees, or any person entering the Community, of the property of which the Community is a part, unless caused by the sole negligence of Landlord. Tenant hereby waives all claims therefore and agrees to indemnity Landlord against any such loss, damage, or liability or any expense incurred by Landlord in connection therewith.

20. Hazardous Substances:

Any product containing hazardous substances, as defined by RCW 70.105D.020, including, but not limited to petroleum products, oil, gasoline, paints, solvents, fertilizers, pesticides, and herbicides, shall be stored in closed containers that are in good condition and kept in a manner to prevent leaking. Tenant shall comply with all federal, state and local laws regarding hazardous substances and shall use products containing hazardous substances only in a non-negligent manner according to the manufacturer's instructions. Tenant shall not allow disposal of any hazardous substance on the Manufactured Home Lot or within the Community in any storm drain, septic or sewer system, or water system. Tenant agrees to immediately clean up any spill of any hazardous substance and notify Landlord of the circumstances surrounding the spill and actions taken. Tenant agrees to indemnify and hold Landlord harmless from any and all liability arising out of any release of hazardous substances caused by Tenant or by breach of this Rental Agreement.

21. Condemnation – Eminent Domain:
In the event the whole or any part of the Manufactured Home Lot shall be taken by any competent authority for public or quasi-public use, then and in that event, the term of this Rental Agreement shall cease and terminate from the date when the possession of the part so taken shall be required for such use or purpose. All damages awarded for such taking shall belong to and be the property of Landlord.

22. Zoning:
The current zoning for the community is MSF (mixed single family). 1 @ 35+ min. 1 @ 55+ min.

23. Notice/Landlord Identification:
Any notice required to be served by Tenant upon Landlord in accordance with the terms of this Rental Agreement shall be delivered to the Manager, whose address is 19525 100th Ave. Ct. E., Graham, Washington 98338. The Manager is hereby directed to act as agent for the Landlord for the purposes of serving notices and process. The Landlord is Azalea Gardens LLC, whose address is 19525 100th Ave. Ct. E., Graham, Washington 98338.

24. Mediation:
In the event Tenant fails to participate in mediation as required by RCW 59.20.080(3), Landlord shall be entitled to recover from Tenant all fees and costs incurred in the mediation process.

25. Forwarding Address:
In the event an emergency or abandonment of Tenant's manufactured home, Tenant's forwarding address is _____.
The person who would likely know the whereabouts of Tenant is Ken & Lauri McIntosh who resides at P.O. Box 803, Hoodsport, WA 98548.

26. Secured Party:
The name of each lending Institution (or other entity or person) who has secured interest in Tenant's home is Sound Community Bank, Lakewood Branch, whose address is 6111 Lakewood Towne Center Blvd SW, Suite B, Lakewood, WA 98499
The secured party's account number for the subject security agreement is _____. Tenant shall provide Landlord with a copy of Tenant's ownership title of the manufactured home occupying the Manufactured Home Lot, at Landlord's request.

27. Attorneys' Fees:
In any action arising out of this Rental Agreement, including eviction, the prevailing party shall be entitled to its reasonable attorneys' fees and costs.

28. Severability:
If any term, covenant, condition or provision of the Rental Agreement is held by a court of competent jurisdiction to be invalid, void, or unenforceable, the remainder of the provisions herein set forth shall remain in full force and effect.

29. Enforcement:
Failure of Landlord to insist upon the strict performance of the terms, covenants, agreements, and conditions herein contained, shall not constitute or be construed as a waiver or relinquishment of Landlord's rights thereafter to enforce any such term, covenant, agreement, or condition but the same shall continue in full force and effect. Landlord's acceptance of any rent after Tenant breaches the Agreement shall not waive Landlord's rights or remedies created by Tenant's breach.

30. Heirs and Successors:
Subject to the provisions herein pertaining to assignment and subletting, the covenants and agreements of this Rental Agreement shall be binding upon heirs, legal representatives, successors, and assigns of any or all of the parties herein.

31. Attachments:
Attachments made part of this Rental Agreement are as follows: (a) Addendum "A"-Community Rules and Regulations; (b) Addendum "B"-Architectural and Landscaping Specifications; (c) Addendum "C"-Pet Agreement; _____.

32. Chapter 59.20 RCW requires the following statement be included in this Agreement:

LANDLORD'S COVENANT:

PURSUANT TO CW 59.20.060 (1)g(I), LANDLORD COVENANTS, EXCEPT FOR ACTS OR EVENTS BEYOND THE CONTROL OF LANDLORD, THAT AZALEA GARDENS WILL NOT BE CONVERTED TO A LAND USE THAT WILL PREVENT THE LOT THAT IS SUBJECT OF THE LEASE FROM CONTINUING TO BE USED FOR ITS INTENDED USE FOR A PERIOD OF THREE YEARS AFTER THE BEGINNING OF THE INITIAL TERM OF THE LEASE OR UNTIL DECEMBER 31, 2025, WHICHEVER IS LATER.

UNDERSTOOD AND AGREED UPON this 8th **day of** Aug., 2004.

LANDLORD:

By: Diane L. Lee

TENANTS:

The Smart Money is Here

Because you buy only your home, not the land beneath it, your housing dollar goes further at Azalea Gardens.

If you are like most people, you will find that after you sell your current house, you can buy a new manufactured home at Azalea Gardens and still put a sizable amount into investments. Those investments will be working for you as you enjoy all of Azalea Gardens' amenities.

Azalea Gardens offers long term lot leases that are keyed to the Consumer Price Index, for buyers protection.

Long-term lot leases have numerous benefits. The developer, not the homeowner, pays for all of the following:

- Maintenance of entry, clubhouse and common areas
- Maintenance of streets, sidewalks, electronic gates and community lighting

In addition, a long-term lease provides you with the following privileges:

- Life-style of an adult community
- Use of a clubhouse and recreational area
- Protection of your investment through strong community guidelines and covenants
- R.V. parking available with electrical hook-ups
- On-site Management
- No homeowner association dues!

Reserve Your Site and Home Today!

A $1000 refundable deposit will reserve a lot and hold the price of the home for 90 days while you sell your current home.

For details call: (253) 847-8787 or 1-877-847-8787 Toll Free

Appendix B - Trial Exhibit 2

AZALEA GARDENS

Rev. 08/22/03

FREQUENTLY ASKED QUESTIONS

What is the exact scope of work?

The scope of work is to prepare the street surface for work by removing sediment and debris, crackfill any cracks in the street, petroseal oil spots, sealcoat approximately 128,000 square feet of asphalt and stripe the clubhouse parking lot. Additionally, one area approximately 150 square feet in size will be repaired.

A recent article in 'Bottom Line Personal Newsletter' warns about coal-tar based sealants frequently used on asphalt roads which raises environmental safety concerns.

The agreed upon sealant to be used will be either Resurfacer XLR8 or Armor Seal A-100 or better. Neither of these products use coal-tar as their base; both products are water based.

We think they (the roads) are in good condition. The general condition of the street surfaces does not seem to indicate extensive repair is needed at this time. Why spend money on sealcoating when resurfacing is not needed? There are less expensive solutions to the road repairs.

Overall, the roads are in good condition which is the result of good installation using good materials! And, it is true that there are no extensive repairs that are needed. However, caring for the roads during their lifespan is a capital expenditure to maintain physical structure. Undertaking proper care of the roads now will prolong their life meaning less cost over time.

We would appreciate the definition between capital improvements and maintenance. We do not feel this work should be categorized as a capital improvement.

Good question! You are likely to find many different answers when trying to define the difference between capital improvements and maintenance depending on who you ask. In the business of real estate investments and property management, the determination of expenses as being either 'maintenance' or a 'capital improvement' is generally determined by the Internal Revenue Service's guidelines. CPA's filing tax returns for real estate investments, such as Azalea Gardens, have codes provided by the IRS that instruct the CPA on classifying expenses as either a maintenance expense that is deducted in the year it was incurred, or as a capital improvement that is depreciated over time. Generally speaking, taxpayers are required to capitalize expenses that substantially prolong life of the property.

How will Azalea Gardens ownership treat this expenditure with the Internal Revenue Service?

The asphalt project for Azalea Gardens under IRS code will be depreciated over time as a capital expense.

This is private property and the streets are owned by Azalea Gardens. Why should homeowners pay the cost for this project? It is not our responsibility to pay for anything other than the land lease.

Yes, Azalea Gardens is private property, and common areas such as the streets are owned by Azalea Gardens. Upon move-in to the community, each resident negotiated a lease with Azalea Gardens that outlines each party's rights and responsibilities. One of the clauses of most leases signed states the resident shall pay the pro-rated portion of the cost of capital improvements. Residents agreed, in writing, they would be responsible for this. We would be happy to provide you a copy of your lease if you have misplaced your copy.

Appendix C - Trial Exhibit 5

RCW 59.20.130 (9) of the Mobile Home Landlord Tenant Act, states 'It shall be the duty of the landlord to maintain roads within the mobile home park in good condition'.

We are well aware of this language in the MHLTA and are not trying to avoid our responsibility to maintain the roads. In fact, our efforts in proceeding with this project is to take care of the roads to ensure they remain in good condition. The MHLTA does not prohibit the landlord from otherwise agreeing with the resident as to who will financially fund the caring for the roads. To the contrary, RCW 59.20.060(2)(c) allows your rents to be determined by formula. The leases negotiated and signed with each resident does state that residents will pay the pro-rated portion of this type of work.

RCW 59.20.135 (2) of the Mobile Home Landlord Tenant Act, states 'A mobile home park owners is prohibited from transferring responsibility for the maintenance or care of permanent structures within the mobile home park to the tenants of the park. A provision within a rental agreement or other document transferring responsibility for the maintenance or care of permanent structures within a mobile home park to the part tenants is void'.

Azalea Gardens is not transferring responsibility for the maintenance or care of permanent structures. We maintain that the roads of the community belong to Azalea Gardens. No language exists in the lease or its related documents or the letter distributed about the asphalt project transferring responsibility for the maintenance and care of the roads. Azalea Gardens has decided the work is necessary and to perform the project, we have determined the scope of work, we have interviewed and selected a contractor to perform the work and we will supervise the work to be done. No individual resident is expected to perform any maintenance or care for the roads.

DECLARATION OF SERVICE

I, Dan R. Young, declare to be true under penalty of perjury under the laws of the State of Washington as follows:

1. I am an attorney representing the respondents Neal McIntosh et al. in this action.

2. On June 1, 2015, I sent by the USPS, first class mail with pre-paid postage affixed, a copy of the foregoing Respondent's Brief to the following:

Olsen Law Firm PLLC
Walter H. Olsen, Jr., Esq.
205 S. Meridian
Puyallup, WA 98371

Sidney Tribe, Esq.
Talmadge/Fitzpatrick/Tribe
2775 Harbor Avenue SW
Third Floor, Suite C
Seattle, WA 98126

Dated: June 1, 2015, at Seattle, Washington.

Dan R. Young

Dan R. Young